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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

NO. 72-656

ORVAL C. LOGUE, individually and as personal representative of his deceased son, Reagan Logue, and ALICE MARIE BLOUIN, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Orval C. Logue, individually and as personal representative of his deceased son, Reagan Logue, and Alice Marie Blouin, the natural mother of Reagan Logue, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit dated May 1, 1972. Petitions for Rehearing and for Rehearing En Banc were denied on July 31, 1972, with Brown, Chief Judge, and Wisdom and Goldberg, Circuit Judges, filing an opinion dissenting from the denial of rehearing en banc.

OPINIONS BELOW

The district court's memorandum opinion (Appendix A, *infra*, p. 21), awarding Petitioners recovery under the Federal Tort Claims Act, is reported at 334 F.Supp. 322. The opinion of the court of appeals (Appendix B, *infra*, p. 28) is reported at 459 F.2d 408 and the opinion dissenting from the denial of rehearing en banc (Appendix C, *infra*, p. 36) is reported at 463 F.2d 1340.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1972. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This case presents the issue whether the United States government may exempt itself from liability under the Federal Tort Claims Act for injuries negligently caused to a federal prisoner, by relinquishing supervision over the prisoner to a local county jail pursuant to a contract providing for housing federal prisoners in the jail.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671) are set forth in Appendix D, *infra*, p. 43). The statute imposing on the United States the duty to safely keep, care for, and protect federal prisoners (18 U.S.C. § 4042) is reproduced in Appendix E, *infra*, p. 45. The statute authorizing the United States to contract with non-federal governmental authorities for the detention of federal prisoners (18 U.S.C. § 4002) is set forth in Appendix F, *infra*, p. 47.

STATEMENT

The deceased, Reagan Logue, was arrested by a Deputy United States Marshal on a bench warrant charging him with conspiracy to smuggle marijuana into the United States, and was placed by the Deputy Marshal in the Nueces County jail as a federal prisoner. While so incarcerated the prisoner attempted suicide by inflicting a serious cut on his left arm. Thereafter, he was transported from the jail to a local hospital, where he was treated for the laceration and diagnosed as acutely psychotic.

Despite doctors' recommendations that the prisoner remain in hospital until he could be transferred to another medical facilitiy, the Deputy Marshal returned the prisoner to the jail, where he was placed, at the Deputy Marshal's request, in a cell stripped of everything but a bunk bed, commode and wash basin. The Deputy Marshal, however, made no specific arrangements for constant surveillance of the prisoner, although he knew the prisoner had serious suicidal tendencies and should be protected against injuring or killing himself. The jail employees also knew the prisoner had serious suicidal tendencies, but their surveillance was mainly limited to checking on the prisoner when they happened to be bringing another prisoner onto the same floor of the jail. During one of the periods between these random checks, the prisoner removed the long Kerlix bandage that bound the wound from his first suicide attempt and hanged himself with it.

The district court held that the Deputy U. S. Marshal was negligent in failing to make specific arrangements for constant surveillance of the prisoner, that the jail employees were negligent in failing to keep the prisoner under constant surveillance, and that the United States

government was liable for both these acts of negligence under the Federal Tort Claims Act. The court of appeals reversed, holding that (a) the Deputy Marshal had no authority or power to control the internal functions of the Nueces County jail and, therefore, had no duty to make specific arrangements for the prisoner's constant surveillance; and that (b) 18 U.S.C. § 4002, authorizing the United States to contract with non-federal governmental authorities for the detention of federal prisoners, fixed the status of the Nueces County jail as that of a "contractor", thereby insulating the United States from liability for the negligence of the jail's employees under the Federal Tort Claims Act, 28 U.S.C. § 2671. Chief Judge Brown, with whom Circuit Judges Goldberg and Wisdom joined, filed an opinion dissenting from the denial of rehearing en banc in which he questioned the reasoning of the court of appeals on the merits and stated his belief that the importance of the issues raised in the case warranted en banc reconsideration by the court.

REASONS FOR GRANTING THE WRIT

I. Whether the United States may exempt itself from liability under the Federal Tort Claims Act for injuries negligently caused to a federal prisoner, by relinquishing supervision over the prisoner to a local county jail pursuant to a contract providing for housing of federal prisoners in the jail, is an important question of federal law which has not been, but should be, settled by this Court.

This Court held in *United States v. Muniz*, 374 U.S. 150 (1963) that federal prisoners were entitled to sue

under the Federal Tort Claims Act for personal injuries sustained during confinement in prison by reason of the negligence of government employees. Such suits could be maintained, said the Court, even if the law of the state in which the tort occurred immunized jailers from suit by their prisoners, since the duty of care owed by the government to federal prisoners is fixed by 18 U.S.C. § 4042, independent of an inconsistent state rule. *United States v. Muniz, supra,* 374 U.S. at 163-165. The Court noted that under the Act the government was not without defenses to suits by federal prisoners, but expressly declined to ". . . intimate any opinion upon their applicability to these complaints, since no such issue is presented for our review." *United States v. Muniz, supra,* 374 U.S. at 163. Thus the issue presented in the instant case—whether a federal prisoner may bring a Federal Tort Claims action against the United States government for negligently caused injuries sustained while he is confined in a local jail pursuant to a contract between the government and the jail—was left undecided by *Muniz.* It is an issue of national importance to the criminal justice system administered by the federal government. Like the fundamental issue resolved in *Muniz,* it is an issue that must be decided by this Honorable Court.

Published statistics are unavailable, but it is estimated that the Bureau of Prisons has an average of 800 contracts with state and local jails to provide housing for federal prisoners.[1] While these "contract jails" hold very

1. The statistics and estimates relating to federal prisoners and to the number of federal contracts with local jails were given to counsel for Petitioners by the Office of the General Counsel, Federal Bureau of Prisons. According to that office, however, the information was actually provided by the Bureau's Division of Community Services.

few of the federal prisoners who have been tried and sentenced,[2] they hold the overwhelming majority of those who are "pre-trial detainees"—persons arrested and detained in connection with federal offenses. Again, published data is lacking, but the Bureau of Prisons estimates that on any given day there is an average of 4,000 unsentenced federal prisoners in non-federal facilities. This figure stands in sharp contrast to the number of unsentenced federal prisoners in federal facilities: 652 for the week ending August 10, 1972.[3] With the dockets of the federal courts becoming increasingly more congested, there is little doubt that the number of unsentenced federal prisoners in local jails will steadily rise in the future. The point to be made, of course, is that the United States government has made the "contract jail" a necessary and apparently permanent part of the federal criminal justice system, and that the number of persons affected by the decision to deny federal prisoners in those jails the right to the statutory duty of care of 18 U.S.C. § 4042 and the FTCA remedy for its breach is substantial. A decision of this magnitude must be made by the highest court in the land.

But there is a deeper, fundamentally moral reason why the Court should hear this case, and that is that the conditions to which the federal government subjects its prisoners when it turns them over to local jails are, as a general rule, abhorrent. In case after case, both federal and state courts are finding that the treatment of prisoners in

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2. The number of sentenced federal prisoners in non-federal facilities in September, 1972, was reported to be only 246 (173 women, 33 men, and 40 juveniles).

3. *See* "Federal Prisoners Confined Week Ended 08/10/72", provided by the Federal Bureau of Prisons' Community Services Division through the Bureau's Office of General Counsel, Appendix G, *infra*, p. 50.

local jails violates basic standards of human decency.[4] Overcrowding, inadequate supervision, no separation from dangerous and contagiously ill prisoners, substandard medical care, exposure to extreme temperatures, unsanitary kitchen and bathing facilities, and the risk of loss of life from fire are among the several outrages that the courts have found to constitute cruel and unusual punishment

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4. *See e.g.*, Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972) (Alameda County, California); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) (Pulaski County, Arkansas); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd. sub. nom.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (Lucas County, Ohio); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970) (Orleans Parish, Louisiana). Bryant v. Hendrick, (Phila. C.P.) *aff'd.*, 280 A.2d 110 (Pa. Sup. Ct. 1971). For a summary of the lower court opinion in *Bryant* see 7 Crim. L. Rep. 2463. *See also*, Jackson v. Hendrick, (Phila. C.P. 1972) summarized in 40 U.S.L.W. 2710 (May 2, 1972), *on appeal*, No. 576CD 1972, in the Commonwealth Court of Pennsylvania.

Inquiries made of the attorneys for the plaintiffs in the foregoing cases revealed that federal prisoners are presently housed in Pulaski County Jail in Little Rock (Hamilton v. Love, *supra*), and in Orleans Parish Jail in New Orleans (Hamilton v. Schiro, *supra*), although they have been removed to an annex in the latter instance. Apparently as the result of the litigation in *Jones v. Wittenberg, supra*, the Lucas County Sheriff is presently refusing to accept federal prisoners in the Lucas County Jail, Toledo, Ohio. All federal prisoners are now housed in nearby Adrian, Michigan and transported to Toledo for federal court appearances. Despite the conditions found to exist in the Dallas County Jail (Taylor v. Sterrett, *infra*, note 5), federal prisoners are still kept in that facility. At the direction of the district court in *Brenneman v. Madigan* in March, 1971, the U.S. Marshal stopped placing federal prisoners in the Greystone section of Alameda County's Santa Rita Rehabilitation Center. Improvements have been made in that facility, however, and federal prisoners are again housed therein. Federal prisoners were withdrawn from Holmesberg jail, Philadelphia County, (Bryant v. Hendrick, *supra*), after the prisoner riot in July, 1970. Federal prisoners are still housed in Philadelphia's Detention Center and House of Correction (Jackson v. Hendrick, *supra*), although nearby state penal institutions are also used.

and a denial of due process and equal protection of the laws.[5] Such conditions are even more contemptible as they apply to those merely charged with crime, since the governmental interest in punishing criminal offenders, which might arguably justify some of the conditions found in the jails, is inapplicable to the treatment of persons whose guilt has not been proved.[6] As has been seen, the great bulk of the federal prisoners placed in these jails are in this category. According to the evidence developed in the instant case, the federal government does not require that its prisoners be separated from the state prisoners or that

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5. Recently, a federal district court in Texas held that the conditions in the Dallas County jail violated the Texas statute detailing the minimum requirements for "safe and suitable jails" in the state. Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972). The plaintiffs also challenged the constitutionality of the conditions, but the court chose to base its decision on Article 5115, Texas Revised Civil Statutes. While the conditions of the Nueces County jail, where the prisoner in the instant case was held, have not been the subject of litigation, they are certainly no better than those in the Dallas County jail. For a description of current conditions in the Nueces County jail, see McKinney, *Nueces Facility—trying experience for jailed, jailers*, The Corpus Christi Caller-Times, October 1, 1972, § A, at 6, col. 5, noting, *inter alia*, the increased burden placed on the jail by the rising number of illegal aliens detained there by the federal government. Appendix H, *infra*, p. 48.

6. In *Hamilton v. Love*, supra, note 4, 382 F. Supp. at 1191, the court noted that the lot of those detained while awaiting trial appeared to be worse than that of those convicted and serving their sentences in the Arkansas state penitentiaries. The full impact of this observation cannot be felt until it is remembered that conditions in the Arkansas state penitentiaries have been found to violate the Eighth Amendment. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). For a discussion of the pretrial detainee problem see, Note, *Incarcerating the Innocent: Pretrial Detention in Our Nation's Jails*, 21 Buff. L. Rev. 891 (1972); Note, *Constitutional Limitations on Conditions of Pretrial Detention*, 79 Yale L.J. 941 (1970).

they be given any special treatment.[7] In short, the federal government each day relinquishes the supervision of thousands of persons whose guilt of any crime has not been established to local facilities which are woefully inadequate even for the state prisoners they must house. And, according to the Court of Appeals for the Fifth Circuit, once the United States government surrenders physical custody of a federal prisoner to such a facility it extinguishes its liability for whatever harm might befall that prisoner afterwards. Whether, as a matter of public policy and good conscience, this should be the law is a question that demands the attention of this Honorable Court.

In his opinion dissenting from the denial of rehearing en banc, in which Circuit Judges Goldberg and Wisdom joined, Chief Judge Brown posed the fundamental question in this case by way of analogy.

> If a Deputy United States Marshal, after discovering a tubercular prisoner's critical physical condition, nevertheless decided to consign that individual to the custody of State authorities in a county jail without first determining whether the facilities provided adequate treatment for tuberculosis victims, and without even attempting to find out whether the conditions of confinement reasonably assured continued survival, I have difficulty believing that the Government's liability under the Federal Tort Claims Act for death resulting from lack of proper medical attention or from an unsanitary environment could

7. Testimony of Gerald L. Jones, Supervisory Deputy U.S. Marshal for the Southern District of Texas. See printed appendix of the record in this case, volume II, at 386-387.

> [T]he Bureau of Prisons would frown very muchly [sic], very muchly [sic] so, if he [a federal prisoner] received any better treatment than any other prisoner in the jail, whether it be federal, state, county.

App., Vol. II at 387.

> be avoided with the bland assertion that the Marshal had no authority to convert the jail into a hospital. Since the facts of the present case are not materially different, I suggest that this serious and previously unresolved problem involving the care of Federal prisoners temporarily confined under contract with State officials is of sufficient importance to merit en banc reconsideration by the Court.[7a]

For the same reason, the decision of the court of appeals should be reviewed by this Court.

II. The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of this Court, and with decisions of the courts of appeal for the District of Columbia, Second and Tenth circuits.

A. The negligence of the Marshal.

Section 4042 of Title 18, United States Code, declares that the Bureau of Prisons, under the direction of the Attorney General, shall provide, *inter alia*, for the quartering, safekeeping, care, and protection of all persons charged with or convicted of offenses against the United States.[8] As Judge Brown pointed out in his opinion dissenting from the denial of rehearing en banc, no one disputed that this statute explicitly charged the Marshal with the affirmative duty to provide for the safekeeping, care and protection of persons, like Reagan Logue, who were accused of federal offenses.[9] No one suggested that the Marshal lacked knowledge of the prisoner's serious suicidal tendencies, or that the Marshal made any reasonably

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7a. Appendix C, *infra*, at p. 36.

8. For the full text of 18 U.S.C., See 4042, Appendix E, *infra*, p. 45.

9. See, Appendix C, *infra*, at p. 36.

diligent effort to assure proper supervision of the prisoner while he was confined alone in his cell, or that the same tragic result would have occurred even had the prisoner remained in a hospital equipped to provide the necessary surveillance. The only justification advanced by the court of appeals for overturning the district court's finding of negligence on the part of the Marshal is the conclusion that the record provides no basis for holding that he "had any power or authority to control any of the internal functions of the Nueces County jail."[10]

Judge Brown's dissenting opinion correctly points out that the Marshal's ability to control the internal functions of the jail is immaterial to his duty under 18 U.S.C. §4042 to care for and protect federal prisoners.

> Without initiating an extensive discourse on the state of the evidence—which seems to offer at least some tangible support for the theory that the Sheriff and his deputies were subject to the Marshal's control because they frequently complied with his informal instructions or suggestions—I need only point out that the question of the Marshal's authority to effect changes in the conditions of confinement is actually irrelevant here. The breach of the statutory duty of care occurred when Logue was confined under circumstances which the Marshal knew were inherently dangerous in the absence of special precautions, regardless of what he may or may not have been empowered to do about the situation. Once the Government undertakes performance of an act entailing a duty of ordinary care it may not thereafter avoid liability under the Federal Tort Claims Act simply by abandoning the undertaking and attempting to attribute the responsibility to someone else. *Indian Towing Company v. United States*, 1955, 350

10. See, Appendix B, *infra*, at page 34.

U.S. 61, 69, 76 S.Ct. 122, ____, 100 L.Ed. 48, 56; *United States v. Gavagan*, 5 Cir., 1960, 280 F.2d 319, *cert. denied*, 1961, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365.

Rather than providing for Logue's safety, the Marshal simply abandoned him, thus breaching the duty of care which, "in the case of a mental patient, * * * must be reasonably adapted and proportioned to his known suicidal, homicidal, or other like destructive tendencies." *United States v. Gray*, 10 Cir., 1952, 199 F.2d 239, 242.[11]

The instant case presents a stronger argument for government liability than either *Indian Towing* or *Gray*, since here the United States was under a specific, *statutory* duty of care to *all* federal prisoners, regardless of their physical location. If a judicial exception is to be read into 18 U.S.C. §4042 to exclude federal prisoners held in state and local county jails, it should be done by this Court only after careful consideration of the consequences of such a decision.

B. The negligence of the Nueces County jailers.

The court of appeals has also held that the negligence of the state jailers in failing to keep Logue under constant scrutiny cannot be attributed to the United States because the Nueces County jail was a "contractor" within the meaning of 18 U.S.C. 2671. This holding ignores the remainder of the definition of "employee of the government" in that section and conflicts with the Second Circuit's decision in *Witt v. United States*, 462 F.2d 1261 (2d Cir. 1972) and District of Columbia Circuit's decision

11. See, Appendix C, *infra*, at pages 39-40.

in *Close v. United States*, 397 F.2d 686 (D.C. Cir. 1968). Furthermore, since the decision of the court of appeals creates a judicial exception to the Federal Tort Claims Act—federal prisoners being held in non-federal facilities —the decision is contrary to this Court's decisions in *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), and in *United States v. Muniz*, 374 U.S. 150 (1963).

Even if it is assumed that the Nueces County jail is a "contractor" under the FTCA, that it not determinative of the United States liability for the negligence of the jail's employees. The Act's definition of an "employee of the government" includes not only "officers or employees of any federal agency" (the definition of which excludes "any contractor"), but also includes *"persons acting on behalf of* a federal agency in an *official capacity, temporarily* or permanently in the service of the United States whether *with or without compensation."* 28 U.S.C. §2671 (1964) (emphasis added). It is difficult to conceive of any situation more appropriate than that presented in the instant case for the application of this latter portion of the statutory definition of government employee. That the Nueces County jailers were acting as federal jailers vis-a-vis Reagan Logue is quite obvious. This was precisely the reason why the District of Columbia Circuit held the United States liable under the FTCA for an injury to a federal prisoner temporarily being held in the D. C. jail at the direction and for the convenience of the United States. *Close v. United States*, 397 F.2d 686 (D.C. Cir. 1968).

> *Since the Congress has clearly committed the custody of and safekeeping of federal prisoners upon conviction to the Attorney General, then it must be true that in this instance the D. C. jailer was serving as*

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> *the Attorney General's jailer;* and it must also be true, or at least it does not appear to the contrary in the record before us, that as to this federal prisoner, the Attorney General had some degree of power, commensurate with his continuous responsibility to supervise the D. C. jailer and his handling of this particular prisoner. *We note in this regard that, for the purposes of the FTCA, Congress has defined "Employee of the [federal] government" as including "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation."* 28 U.S.C. §2671. 397 F.2d at 687. (emphasis added).

Citing the *Close* case, the Second Circuit recently held in *Witt v. United States, supra,* that the United States was liable under the Federal Tort Claims Act for breach of its statutory duty of care to a federal military prisoner under 10 U.S.C. 951(c),[12] even though the injury to the prisoner was caused solely by the negligence of a private person who had physical custody of the prisoner for purposes of having him perform work which the negligent party had contracted to do for a private association of military personnel.

The court rejected the government's argument that "[w]hen Witt [the injured prisoner] climbed into the [private tortfeasor's] trailer, the responsibility of the Disciplinary Barracks for him stood at the curbside."

> "We take a different view. On the day of the accident, the Commandant of the Disciplinary Barracks had "custody of all offenders sent there" and was under a duty to "control and employ offenders as he considers best for their health and reformation . . ."

12. Formerly 10 U.S.C. § 3661 (repealed in 1968).

> *Such a duty may not be absolutely non-delegable, as Witt asserts, but in our view, the duty is an important and broad one. It should not be sidestepped simply by having McQuirk [the private tortfeasor] rather than a permanent employee or an enlisted man transport the prisoners and similarly the duty should not be affected because a particular work detail was "voluntarily" chosen in lieu of other regular work assignments." Witt v. United States, supra,* 462 F.2d at 1265. (emphasis added).

As in *Close* and *Witt*, the United States was under an affirmative statutory duty in the instant case to care for and protect their prisoners. Petitioners submit that 18 U.S.C. § 4042 is an absolutely nondelegable duty that cannot be avoided by the relinquishment of supervision over a federal prisoner, especially where the person or governmental entity to which supervision is relinquished is clearly acting on behalf of the United States in an official capacity.[13] Judge Brown pointed out that:

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13. The Court should also note the decision of the Ninth Circuit in Williams v. United States, 405 F.2d 951 (9th Cir. 1969) affirming the dismissal of a federal prisoner's cause of action based on 18 U.S.C. § 4042 against the county officials on the grounds that that statute created a cause of action only against the United States. On remand the district court held, as did the court of appeals in the instant case, that the United States could not be held liable for the negligence of the county officials, since the county was a "contractor." Williams v. United States, Civil No. 3241-SD-S, Southern District of California, April 1, 1971. Counsel for Petitioners herein has been informed that the appeal of that decision has been dismissed. For a case that questions the reasoning of the district court's opinion in *Williams*, see Brown v. United States, 342 F. Supp. 987, 997-998 (E.D. Ark. 1972), involving an injury to a federal prisoner while he was held in the Pulaski County Jail in Little Rock, Arkansas. Recall that the conditions in the Pulaski County Jail were held violative of the Eighth and Fourteenth Amendments in Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). See note 4, *supra*, and accompanying text.

when the Government decides that a particular individual should assume obligations and responsibilities virtually identical to those of a salaried Federal employee, there may very well be some persuasive basis for the suggestion that such an individual's breach of a specific statutory duty owed by the salaried employee to a specific class of person should visit identical liability upon the United States. *Obviously there is more than a subtle distinction between a "contractor" who breaches a duty of reasonable care owed to the world at large and a "contractor" who performs specific custodial functions that under a plain Congressional mandate would ordinarily entail a definite obligation of due care owed to a discrete (and particularly vulnerable) class of people.* If only for the sake of uniformity and the avoidance of formalistic legal distinctions totally divorced from the realities of the situation, further consideration of the problem might inevitably lead to the conclusion that the Sheriff and his deputies were "employees" within the meaning of the Act, particularly in light of the principle that "the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 1963, 374 U.S. 150, 159, 83 S.Ct. 1850, ____, 10 L.Ed.2d 805, 813. As has long been recognized, "the Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Company*, 1951, 340 U.S. 543, 547, 71 S.Ct. 399, ____, 95 L.Ed. 523, 528 (emphasis added).[14]

In addition, the decision of the court of appeals denying the FTCA remedy to federal prisoners in state jails is clearly offensive to the principle announced by this

14. Appendix C, *infra*, at p. 41.

Court in *Rayonier, Inc. v. United States* and reaffirmed in *United States v. Muniz:*

> There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it. *United States v. Muniz,* 374 U.S. 150, 166 (1963).

It would truly be anomalous if the court of appeals decision immunizing the United States from liability for injuries to its own prisoners to whom it owes a statutory duty of care is allowed to stand unreviewed at a time when judicial impatience with the doctrine of sovereign immunity has led to its abrogation or dilution by judicial decision in state after state.[15]

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15. *See e.g.,* Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Proffitt v. State of Colorado, 482 P.2d 965 (Colo. 1971); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957); Smith v. Idaho, 93 Idaho 795, 473 P.2d 937 (1970); Molitor v. Kaneland Community Unit District No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Campbell v. State, 284 N.E.2d 733 (Ind. 1972); Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Williams v. City of Detroit, 364 Mich. 231, 11 S.W.2d 1 (1961); Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W.2d 795 (1962); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805 (1968); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); McAndrew v. Mularchuk, 33 N.J. 172, 162 A.2d 820 (1960); Barker v. City of Santa Fe, 47 N.M. 85, 136 P.2d 480 (1943); Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970); Honaman v. City of Philadelphia, 322 Pa. 535, 185 A. 750 (1936); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); *see also,* Krause v. Ohio, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971) holding the doctrine of sovereign immunity constitutionally infirm under the Equal Protection Clause. The decision, however, was reversed by the Ohio Supreme Court, 7/19/72. See summary of opinion in 41 U.S.L.W. 2073 (Aug. 8, 1972).

But again, it is the manifest unfairness of allowing the United States to stand immune to liability for injuries to federal prisoners in local lockups that compels that this case be considered by the Court. And again, it is the language of Judge Brown, with which Judges Goldberg and Wisdom agreed, that best makes the point.

> Apart from the difficulties posed by this case in isolation, its implications within the broader context of modern-day prison administration are even more disturbing. Overcrowding and substandard physical facilities inevitably have a progressively detrimental impact on the administrator's ability to insure the health, safety and welfare of those in his custody. Increasingly we are being forced to confront undeniable evidence that the inmates of many institutions routinely subject other prisoners to varieties of subhuman treatment that no citizen of a civilized nation, whatever his transgression against society, should be compelled to endure. That such outrages are inflicted upon those serving sentences following conviction is disgraceful. But when the victim charged with a Federal offense is merely confined temporarily in a State jail while awaiting transfer or release on bond, I hardly think we provide an acceptable answer when we tell him or his family that restitution for death or injury resulting from his custodian's culpable neglect is unavailable because the responsible official was wearing a State rather than a Federal badge. In such circumstances I cannot concede that despite the constable's blunder the Government must go free.[16]

CONCLUSION

Because of the important questions of national policy raised in this case regarding the United States' responsi-

16. Appendix C, *infra*, at p. 42.

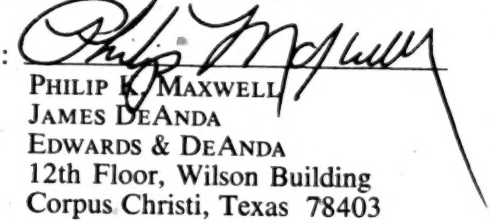
bility to federal prisoners held in non-federal facilities, because of the clear conflict between the circuits on this issue, and because the Fifth Circuit's narrow reading of the Federal Tort Claims Act runs counter to this Court's previous interpretations of the Act, it is clear that this Court should review the decision of the United States Court of Appeals for the Fifth Circuit.

PRAYER

Wherefore, premises considered, Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ORVAL C. LOGUE, ET AL, *Petitioners*

By: 

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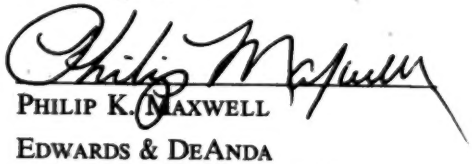
CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been mailed on this 27 day of October, 1972, to Mr. William L. Bowers, Jr., Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77061, and Richard Kleindienst, United States Attorney General, Department of Justice, Washington, D.C.



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APPENDIX "A"

IN THE
DISTRICT COURT OF THE UNITED STATES
For The Southern District Of Texas
Corpus Christi Division

ORVAL C. LOGUE, IND. & AS PERSONAL REPRESENTATIVE OF HIS DECEASED SON, REAGAN EDWARD LOGUE

v.

UNITED STATES OF AMERICA

C. A. NO. 69-C-106

MEMORANDUM AND OPINION

Reagan Edward Logue, a Federal prisoner, hanged himself in the Nueces County jail. His adoptive father, Orval C. Logue, has brought this suit under the provisions of the Federal Tort Claims Act, 28 U.S.C., § 2671, et seq, to recover damages from the government under the Texas Wrongful Death Act, Article 4671, et seq, Revised Civil Statutes of Texas (1925), as amended, for himself and for Reagan Edward Logue's mother, Alice Maire Logue, now Mrs. Blouin, and on behalf of the Estate of Reagan Edward Logue for the decedent's pain and suffering and for funeral expenses. This Court has full and complete jurisdiction of the subject matter of the parties and venue properly lies.

The Court finds the following facts surrounding the death of Reagan Edward Logue:

1. On May 22, 1968, the deceased, then eighteen years of age, was arrested by Deputy United States Marshal Del W. Bowers in Corpus Christi, Texas, on a bench warrant charging the said Reagan Edward Logue with conspiracy to smuggle 229 pounds of marijuana into the United States, and he was placed in the Nueces County jail as a Federal prisoner.

2. At about 3:00 p.m. the next day, the prisoner attempted suicide by inflicting a serious cut upon his left arm. Thereafter, he was transported from the jail to Memorial Hospital, where he was treated for the laceration and admitted with a diagnosis that he was acutely psychotic.

3. On May 24, 1968, Deputy Marshal Bowers, after conferences with his superiors in the Marshal's office and with Shannon Gwin, M.D., the prisoner's medical doctor, decided to return the prisoner to the Nueces County jail. Dr. Gwin recommended to the Deputy Marshal that the prisoner remain in the hospital until he could be transferred to another medical facility. At this time, the prisoner had serious suicidal tendencies and his condition was not improved over what it had been when he was admitted to the hospital the day before.

4. At about 3:30 p.m. on the same day, Dr. Gwin, because he thought he had no choice, released the prisoner from the hospital to Deputy Marshal Bowers, who returned him to the Nueces County jail, pending his transfer to a Federal mental institution.

5. Deputy Bowers knew the prisoner had serious suicidal tendencies and should be protected against injuring or killing himself, and at Deputy Bowers' request, the

prisoner was put in a cell which had been stripped of everything except the bunk with a mattress, the commode and wash basin. The steel walls and ceiling of the cell were symmetrically perforated with round holes about the size of a half dollar. There was no ceiling light fixture. No specific arrangements were made by the Deputy Marshal for constant surveillance of the prisoner, and this was negligence.

6. The Sheriff's employees in the jail knew the prisoner had serious suicidal tendencies, and they did make precautionary surveillance checks after his return from the hospital, but those surveillance checks were made usually in connection with bringing some other prisoner onto the floor where Reagan Edward Logue was incarcerated. This was inadequate surveillance and was negligence.

7. When the prisoner was returned to the Nueces County jail on May 24, 1968, he had a long Kerlix bandage on his arm. At about 4:30 p.m. on the afternoon of the next day he removed the bandage and hanged himself with it. Each act of negligence above mentioned was a proximate cause of his death.

8. During the above-mentioned times, there was a contract for service in non-Federal institutions between Defendant United States of America and Nueces County, Texas, whereby the Sheriff of Nueces County agreed, among other things, to keep custody of Federal prisoners in the Nueces County jail at Corpus Christi, Texas. At all times material hereto, the Deputy United States Marshals involved in the arrest and detention of Reagan Edward Logue were acting within the scope of their employment for the United States government; and the members of the

Sheriff's Department were acting within the scope of their employment.

The Court draws the following conclusions of law from the facts heretofore set out:

1. The decision of Deputy United States Marshal Bowers and his superiors to remove Reagan Edward Logue from the hospital to the Nueces County jail was a discretionary act within the purview of 28 U.S.C., § 2680; but, that decision having been made, the Deputy Marshal had a duty to see that reasonable care be taken at the jail to protect the prisoner against another suicidal attempt. *Smart v. United States,* 10 Cir., 207 F.2d 841; *Costley v. United States,* 5 Cir., 181 F.2d 723.

2. The government is not an insurer of the safety of its prisoner; however, once it became aware, through the knowledge of the Deputy Marshals involved, of the psychotic condition and suicidal tendencies of this prisoner, the reasonable care which the government was required to take was that care necessary to make certain the prisoner did not commit suicide while in jail. *Lange, et al, v. United States,* 179 F. Supp. 777; *United States v. Gray,* 10 Cir., 199 F.2d 239.

3. The fact that there was a contract existing between Defendant and Nueces County regarding the care and custody of Federal prisoners in the status of Reagan Edward Logue who are kept in the Nueces County jail, did not relieve the Defendant of its responsibility of such prisoners, and particularly to Reagan Edward Logue, under 18 U.S.C., § 4042. *Williams v. United States, et al,* 9 Cir., 405 F.2d 951.

4. Whether the Deputy United States Marshal failed to adequately inform the Nueces County jailer as to the necessity for constant surveillance, or the jailer failed to carry out the suggested constant surveillance needed for the protection of the prisoner, makes no difference. *Williams v. United States*, supra; *In Re Morgan*, 80 F. Supp. 810. The government was bound by those negligent acts in either instance.

5. The pre-existing mental condition of the prisoner and mistakes of the natural mother and the adoptive father in the guidance and medical attention provided for their deceased son are not pertinent. The negligence of the United States was the proximate cause of Reagan Edward Logue's death.

The Court must now determine the extent of the Defendant's liability to the Plaintiffs, and this is not an easy task. The adoptive father and the natural mother of the deceased Reagan Edward Logue may recover only the pecuniary benefits they might expect to receive. The determination of their recovery cannot be left to mere guess or conjecture, nor prompted by sympathy.

This young man was first arrested for possession of marijuana in 1967 and thereafter he was extensively involved in drug traffic, as a user and a pusher, in Corpus Christi and Austin, Texas. He had already pleaded guilty to possession of LSD for the purpose of sale in the United States District Court in Austin, Texas, but was not yet sentenced when he was arrested pursuant to an indictment in the Federal Court in Laredo, Texas, for smuggling marijuana into this country. At the time of this last arrest, on May 22, 1968, he was in a serious psychotic

state from the ingestion of LSD or some other toxic agent. All conditions indicated it was extremely unlikely the deceased, had he lived, would have rendered any valuable services for the benefit of either Plaintiff, over and above their expenses, including attorneys' fees, during the remaining two and one half years of his minority.

Any pecuniary advantage to the Plaintiffs after that would obviously depend upon his rehabilitation. Both Dr. White, an intern who saw him only one time and then briefly, and the probation officer felt he could be rehabilitated. This evidence was not impressive. However, medical science continues to progress and, if the young man had lived, the Court cannot say he would not have returned to reality, and earned his own way. He did work as a boilermaker at sixteen and seventeen years of age and was a satisfactory employee. But, whether or not he would have stayed out of trouble, or at some later date accomplished his death, his past record makes the future very uncertain.

It is also important to consider what pecuniary damages the Plaintiffs would have suffered. *Hernandez v. United States,* 313 F. Supp. 349, 364. There is little indication the adoptive father would need any appreciable pecuniary assistance. It is more likely the natural mother would someday need help. The Court finds both parents are entitled to some damages.

Suit was also brought herein on behalf of the Estate of Reagan Edward Logue, deceased, for his pain and suffering immediately prior to his death and for funeral expenses. Plaintiffs admitted in open court that no proof had been made regarding the claim for pain and suffering.

However, the estate is entitled to recover the funeral expenses.

It is, therefore, ORDERED that Orval C. Logue have judgment against the United States of America in the amount of $5,000.00, to be apportioned $3,500.00 to Alice Maire Blouin and $1,500.00 to Orval C. Logue; and the Estate of Reagan Edward Logue, deceased, takes nothing by its suit, except that it shall recover from the United States the funeral expenses in the amount of $1,164.50.

DATED the 16th day of February, 1971.

OWEN D. COX
United States District Judge

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2426

ORVAL C. LOGUE, ETC., Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(May 1, 1972)

Before GEWIN, AINSWORTH and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge: Reagan Edward Logue (hereinafter Logue), on May 25, 1968, while confined in the Nueces County, Texas, jail pursuant to a federal bench warrant, hanged himself. Suit was brought against the United States to recover damages under the Federal Tort Claims Act, Title 28, U. S. Code, Chapter 171, and the Texas Wrongful Death Act, Revised Civil Statutes of Texas, Article 4671, et seq. by the deceased's adoptive

father, Orval C. Logue, his mother, Alice Marie Logue Blouin, and by Orval C. Logue for the estate of Reagan Edward Logue. The district court after an evidentiary trial rendered judgment against the United States in the following amounts: $3,500.00 to the deceased's mother, $1,500.00 to Orval C. Logue and $1,164.50 to the deceased's estate for funeral expenses.

On this appeal by the United States we find no basis for holding it liable in damages for the prisoner's death. We reverse the judgment of the district court and direct entry of judgment for the appellant.

THE FACTS

The 18 year old deceased was arrested on May 22, 1968, at Corpus Christi, Texas, by Deputy United States Marshal Bowers on a federal bench warrant issued by the Laredo Division of the Southern District of Texas charging conspiracy to smuggle 229 pounds of marijuana into the United States. Deputy Marshal Bowers placed the deceased in the Nueces County jail, Corpus Christi, as a federal prisoner. That facility was used as a contract jail by the United States under the provisions of Title 18, U. S. Code, Section 4002.[1]

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1. "§4002. Federal prisoners in state institutions; employment
For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care and proper employment of such persons.
"Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of

About 3:00 P.M. May 23, Logue attempted suicide by cutting veins in his left arm. The wound appeared sufficiently serious for the County jailer to cause him to be taken to Memorial Hospital. There he was treated for the laceration and placed under guard in a bare room in an area of the hospital reserved for mental patients. He was seen by a psychiatrist, Dr. Shannon Gwin, and diagnosed as psychotic. There was testimony at trial that Logue also was then under the influence of an hallucinatory drug, probably LSD. Deputy Marshal Bowers sought advice from his superiors but was unable to produce a satisfactory plan to keep Logue under guard at the hospital.

On May 24, 1968, after further conferring with his superiors in the United States Marshal's Office at Laredo and at Houston and with Dr. Gwin, Deputy Marshal Bowers decided to return Logue to the Nueces County jail, despite Dr. Gwin's recommendation that the prisoner remain in the hospital until he could be transferred to another medical facility equipped to deal with his suicidal tendencies. At about 3:30 P.M. that same day, Dr. Gwin, believing that he had no choice in the matter, released Logue to Bowers, who returned him to the Nueces County jail to await processing for transfer to a federal mental institution. Bowers' trial testimony was that the decision

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the institutions of, the State or political subdivision in which they are imprisoned.

"The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons."

to move the prisoner back to the county jail was made by his superiors.

Deputy Marshal Bowers, aware of Logue's suicidal impulses, requested the Nueces County jail authorities to provide a cell stripped of items likely to prove injurious. In compliance with this request the prisoner was placed in a cell containing nothing except a bunk with a mattress, a toilet and a wash basin. Deputy Marshal Bowers made no arrangements for Logue's cell to be under constant surveillance. Neither did the jail employees undertake continuous surveillance of the prisoner. They did look in on him as they brought other prisoners to his jail floor.

Logue was returned to the Nueces County jail on May 24, wearing a long Kerlix bandage on his injured left arm. About 4:30 P.M., May 25, he removed the bandage and hanged himself with it from his cell bars.

THE DECISION BELOW

The trial court found that Deputy Marshal Bowers was negligent in failing to make arrangements for constant surveillance of the deceased when he was returned to the Nueces County jail on May 24, 1968. In addition, the court below found that the employees of the jail, having actual or constructive knowledge of Logue's suicidal tendencies, were negligent in failing to place him under constant surveillance upon his return to the jail. The district court concluded that both manifestations of negligence were attributable to the United States, thereby rendering it liable in damages for the death of Reagan Edward Logue under the Federal Tort Claims Act.

GROUNDS ASSERTED ON APPEAL

The United States seeks reversal of the judgment below on three grounds:

(1) The district court erred in finding that the negligent acts and/or omissions of the employees of the Sheriff's Office in Nueces County in their handling of a federal prisoner were attributable to the United States.

(2) The district court erred in holding that there was a duty on the part of Deputy Marshal Bowers to provide for constant surveillance of the deceased in the jail, in that to require such surveillance was patently beyond his power or authority.

(3) The district court's finding as to the deceased's future potential and/or prospects to make a financial contribution to the individual plaintiffs is legally insufficient to support the award of damages made.

Inasmuch as we reverse the findings below as to liability, no discussion of the adequacy of the proof as to damages (ground 3 of appeal, supra) appears appropriate. It is unnecessary to reach that contention.

LIABILITY

Relying upon the first paragraph of Title 18, U.S.C., Section 4002 (authority for the Director of the Bureau of Prisons to contract with state and local prison officials), the United States argues that the Nueces County jail was a "contractor" within the meaning of Section 2671,

Title 28, United States Code.[2] From this premise, it reasons that the United States is not liable under the Federal Tort Claims Act for the negligent acts and/or omissions of the Nueces County jail's employees. Additionally, the United States contends that Deputy Marshal Bowers had no authority to require the provision of constant surveillance of the deceased while the latter was confined to the Nueces County jail.

In reply, the plaintiffs argue that Deputy Marshal Bowers was under a duty imposed by Title 18, U.S.C., Section 4042,[3] to insure the safety and well-being of the deceased and that a breach of that duty provides the basis for a recovery from the United States under the Federal Tort Claims Act. The claim is made that in the circumstances of this case such a breach would be

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2. Title 28, U.S.C., §2671:
"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

3. Title 18, U.S.C., Section 4042:
"The Bureau of Prisons, under the direction of the Attorney General, shall —
(1) have charge of the management and regulation of all Federal penal and correctional institutions;
(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
(4) provide technical assistance to State and local government in the improvement of their correctional systems.
This section shall not apply to military or naval penal or correctional institutions or the persons confined therein."

actionable whether committed by the employees of the Nueces County jail or by Deputy Marshal Bowers.

The United States is subject to suit under the Federal Tort Claims Act for injuries suffered by federal prisoners confined in federal facilities. *United States v. Muniz,* 1963, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805. But we agree with the United States that *Muniz* does not extend to the situation now before us, where a federal prisoner is housed in a non-federal facility pursuant to Title 18, U.S.C., Section 4002. We interpret this section as fixing the status of the Nueces County jail as that of a "contractor". Title 18, U.S.C., Sec. 2671, footnote 2, supra. This insulates the United States from liability under the FTCA for the negligent acts or omissions of the jail's employees. We find no support in the record for holding that Deputy Marshal Bowers had any power or authority to control any of the internal functions of the Nueces County jail. The deputy marshal, accordingly, violated no duty of safekeeping with respect to the deceased.

Close v. United States, D.C. Cir. 1968, 397 F.2d 686, relied upon by the appellees, is distinguishable from the case at bar. *Close* was a suit to recover damages under the FTCA for permanent disablement to the plaintiff caused by a fall in the District of Columbia jail allegedly due to defective shoes. The plaintiff was housed in the District jail (not under the jurisdiction of the United States) pending the disposition of his appeal from a conviction by the District of Columbia district court. The Court of Appeals in *Close* reversed the district court's dismissal of the complaint, holding that Congress did not intend to suspend the availability of the Federal Tort

Claims Act to a federal prisoner incarcerated in the District of Columbia jail.

The Court of Appeals in *Close* was careful to note that the United States did not claim that the District of Columbia jail was a contractor of the Federal Government within the meaning of the contractor exception of the Federal Tort Claims Act, Title 28, U.S.C., Sec. 2671, footnote 2, supra. As noted above, such a claim is made with respect to the county jail here involved. The D. C. Circuit also observed the special relationship existing between the Federal Government and the Government of the District of Columbia:

> "We note in this regard that, for purposes of the FTCA, Congress has defined 'Employee of the [federal] government' as including 'persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation'. 28 U.S.C. § 2671. The cases have, on occasion, regarded D. C. Governmental agencies as 'federal agencies' for purposes of the FTCA, depending upon the amenability of such agencies to federal control. We are not persuaded by anything appearing in this record that the Attorney General was, in a matter of this kind, wholly lacking in any capacity to assure the proper care of a prisoner for whose custody he was primarily and permanently responsible." 397 F.2d at 687.

The judgment of the district court is reversed and the cause is remanded with directions to enter judgment for the United States.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2426

ORVAL C. LOGUE, ETC., Plaintiff-Appellee,
versus
UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion May 1, 1972, 5 Cir., 1972, ____ F.2d ____).

(July 31, 1972)

Before GEWIN, AINSWORTH and SIMPSON,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not hav-

ing voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge, with whom, WISDOM and GOLDBERG, Circuit Judges, join dissenting from the denial of rehearing en banc:

If a Deputy United States Marshal, after discovering a tubercular prisoner's critical physical condition, nevertheless decided to consign that individual to the custody of State authorities in a county jail without first determining whether the facilities provided adequate treatment for tuberculosis victims, and without even attempting to find out whether the conditions of confinement reasonably assured continued survival, I have difficulty believing that the Government's liability under the Federal Tort Claims Act for death resulting from lack of proper medical attention or from an unsanitary environment could be avoided with the bland assertion that the Marshal had no authority to convert the jail into a hospital. Since the facts of the present case are not materially different, I suggest that this serious and previously unresolved problem involving the care of Federal prisoners temporarily confined under contract with State officials is of sufficient importance to merit en banc reconsideration by the Court.

No one disputes that the Marshal was explicitly charged by law with an affirmative duty to provide for the safe-

keeping, care and protection of persons in his custody accused of Federal offenses. 18 U.S.C.A. § 4042. No one suggests that the Marshal was not given more than fair warning of his prisoner's unmistakably suicidal tendencies as a result of his initially unsuccessful but obviously serious attempt to take his own life. No one asserts that the Marshal made any reasonably diligent effort to assure proper supervision of the prisoner while he was confined alone in his cell or that the same tragic result would have transpired if Logue had remained in a hospital equipped to provide the necessary surveillance. The only justification advanced for overturning the District Court's finding of negligence on the part of the Marshal is the conclusion that the record provides no basis for holding that he "had any power or authority to control any of the internal functions of the Nueces County jail."

Without initiating an extensive discourse on the state of the evidence—which seems to offer at least some tangible support for the theory that the Sheriff and his deputies were subject to the Marshal's control because they frequently complied with his informal instructions or suggestions[1]—I need only point out that the question of the Marshal's authority to effect changes in the conditions of confinement is actually irrelevant here. The breach of the statutory duty of care occurred when Logue was confined under circumstances which the Marshal knew were inherently dangerous in the absence of special precautions, regardless of what he may or may not have been empowered to do about the situation. Once the Government undertakes performance of an act entailing a duty

1. The panel's opinion supports this position by stating that the Nueces County authorities complied with the Marshal's request that Logue be placed in a cell stripped of all items likely to prove injurious.

of ordinary care it may not thereafter avoid liability under the Federal Tort Claims Act simply by abandoning the undertaking and attempting to attribute the responsibility to someone else. *Indian Towing Company v. United States,* 1955, 350 U.S. 61, 69, 76 S.Ct. 122, ____, 100 L.Ed. 48, 56; *United States v. Gavagan,* 5 Cir., 1960, 280 F.2d 319, *cert. denied,* 1961, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365.

Rather than providing for Logue's safety, the Marshal simply abandoned him, thus breaching the duty of care which, "in the case of a mental patient, * * * must be reasonably adapted and proportioned to his known suicidal, homicidal, or other like destructive tendencies." *United States v. Gray,* 10 Cir., 1952, 199 F.2d 239, 242. In this respect the present case is equivalent to *Underwood v. United States,* 5 Cir., 1966, 356 F.2d 92, in which liability under the Act resulted from the Air Force's negligence in permitting a mentally deranged Airman to return to unrestricted duty and to draw from the armory a pistol he subsequently used to kill his wife. There was no suggestion that liability was contingent upon the exercise of "authority" or "control" by the Government at the time of the shooting, since liability arose only from the initial failure to utilize ordinary care. The same is true here—the Marshal's purported inability to arrange for the continuous observation of the prisoner does not excuse the earlier breach of the duty to provide a reasonably safe place of confinement.[2]

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2. The Government attempts to distinguish *Underwood* by implying that here its statutory responsibilities were somehow "delegated to the Sheriff and his deputies. Neither the statutes nor the case law sanctions such a "delegation." Indian Towing Company v. United States, *supra;* United States v. Gavagan, *supra.*

The Court also reasons that the negligence of the State authorities in failing to keep Logue under constant scrutiny cannot be attributed to the United States because the Nueces County jail was a "contractor" within the meaning of 18 U.S.C.A. § 2671. Of course I do not dispute the axiomatic proposition that ordinarily such a "contractor" is not an "employee" for whose negligence the Government is liable under the Act. *Emelwon, Inc. v. United States,* 5 Cir., 1968, 391 F.2d 9, *cert. denied sub nom. Florida v. Emelwon, Inc.,* 393 U.S. 841, 89 S.Ct. 119, 21 L.Ed.2d 111. However, here the plaintiffs rely primarily upon that portion of the Act defining "employees" as "* * * persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States whether with or without compensation." 28 U.S.C.A. § 2671. Since under the contract arrangement State authorities perform all functions incidental to the confinement of Federal prisoners that would otherwise be performed by the United States Marshal, the theory is that the Marshal's office is a "federal agency" on behalf of which State jailers act "in an official capacity, temporarily * * * in the service of the United States." In effect, the Nueces County Sheriff and his deputies become surrogate Marshals for purposes of Federal tort liability.

While passing no final judgment at this stage, I do point out that this argument was barely mentioned in the panel's opinion, much less refuted by it. The Government contends that a Marshal has no authority to appoint a State law enforcement officer to act on behalf of or in the service of the United States, yet under the literal wording of the statute the absence of such authority would appear to be irrelevant. Moreover, when the Government decides

that a particular individual should assume obligations and responsibilities virtually identical to those of a salaried Federal employee, there may very well be some persuasive basis for the suggestion that such an individual's breach of a specific statutory duty owed by the salaried employee to a specific class of persons should visit identical liability upon the United States. Obviously there is more than a subtle distinction between a "contractor" who breaches a duty of reasonable care owed to the world at large and a "contractor" who performs specific custodial functions that under a plain Congressional mandate would ordinarily entail a definite obligation of due care owed to a discrete (and particularly vulnerable) class of people. If only for the sake of uniformity and the avoidance of formalistic legal distinctions totally divorced from the realities of the situation, further consideration of the problem might inevitably lead to the conclusion that the Sheriff and his deputies were "employees" within the meaning of the Act, particularly in light of the principle that "the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well." *United States v. Muniz*, 1963, 374 U.S. 150, 159, 83 S.Ct. 1850, ____, 10 L.Ed.2d 805, 813. As has long been recognized, "the Federal Tort Claims Act waives the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Company*, 1951, 340 U.S. 543, 547, 71 S.Ct. 399, ____, 95 L.Ed. 523, 528.

Apart from the difficulties posed by this case in isolation, its implications within the broader context of modern-day prison administration are even more disturbing.

Overcrowding and substandard physical facilities inevitably have a progressively detrimental impact on the administrator's ability to insure the health, safety and welfare of those in his custody. Increasingly we are being forced to confront undeniable evidence that the inmates of many institutions routinely subject other prisoners to varieties of subhuman treatment that no citizen of a civilized nation, whatever his transgression against society, should be compelled to endure. That such outrages are inflicted upon those serving sentences following conviction is disgraceful. But when the victim charged with a Federal offense is merely confined temporarily in a State jail while awaiting transfer or release on bond, I hardly think we provide an acceptable answer when we tell him or his family that restitution for death or injury resulting from his custodian's culpable neglect is unavailable because the responsible official was wearing a State rather than a Federal badge. In such circumstances I cannot concede that despite the constable's blunder the Government must go free.

I dissent from the denial of rehearing en banc.

APPENDIX "D"

Section 1346(b) of Title 28, United States Code, provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2 (a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951, c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

Section 2671 of Title 28, United States Code, provides as follows:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

> "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States. As amended July 18, 1966, Pub. L. 89-506, § 8, 80 Stat. 307.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982; May 24, 1949, c. 139, § 124, 63 Stat. 106.

APPENDIX "E"

Section 4042 of Title 18, United States Code, provides as follows:

> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
>
> (4) provide technical assistance to State and local government in the improvement of their correctional systems.
>
> This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.
>
> June 25, 1948, c. 645, 62 Stat. 849; July 1, 1968, Pub.L. 90-371, 82 Stat. 280.

APPENDIX "F"

Section 4002 of Title 18, United States Code, provides as follows:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons many contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.
>
> Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.
>
> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.
>
> June 25, 1948, c. 645, 62 Stat. 847.

APPENDIX "G"

FEDERAL PRISONERS CONFINED WEEK ENDED 9/10/72

INSTITUTION	POPULATION PRESENT	POPULATION PREVIOUS YEAR	PLANNED CAPACITY BASE OPTIMUM	PLANNED CAPACITY TEMPORARY PLAN	PRESENT +/-TEMPORARY	SELECTED TYPES SENTENCED	SELECTED TYPES UNSENTENCED
TOTAL, ALL INSTITUTIONS...	22,393	21,338	20,698	21,553	+840	21,741	652
JUVENILES & YOUTHS	1,089	1,024	1,136	1,111	-22	1,053	36
ASHLAND	531	477	450	475	+56	519	12
ENGLEWOOD	333	331	325	325	+8	316	17
MORGANTOWN (MALE)	183	199	325	275	-92	179	4
MORGANTOWN (F) 7-11-71.	42	17	36	36	+6	39	3
YOUNG ADULTS	4,355	3,907	3,900	4,025	+330	4,258	97
EL RENO	1,071	901	900	925	+146	1,059	12
LOMPOC	1,067	899	1,050	1,100	-33	1,052	15
MILAN	601	579	550	550	+51	551	50
PETERSBURG	616	612	500	525	+91	604	12
SEAGOVILLE	409	394	400	400	+9	409	0
TALLAHASSEE	591	622	500	525	+66	583	8
LONG TERM ADULTS	9,139	9,478	8,590	9,040	+99	9,117	22
ATLANTA	2,158	2,328	2,100	2,200	-42	2,152	6
LEAVENWORTH	1,944	2,208	1,900	2,000	-56	1,943	1
LEWISBURG	1,485	1,514	1,350	1,375	+110	1,472	13
ALLENWOOD	336	330	325	350	-14	336	0
MARION	524	508	525	525	-1	524	0
MARION (CAMP) 10-18-71.	92	0	90	90	+2	92	0
MCNEIL ISLAND (PEN.)	905	955	820	900	+5	905	0
MCNEIL ISLAND (CAMP)	249	257	280	300	-51	249	0
TERRE HAUTE	1,446	1,378	1,200	1,300	+146	1,444	2
INTERMEDIATE TERM ADULTS	3,728	3,321	3,370	3,550	+178	3,623	105
DANBURY	722	764	650	700	+22	686	36
LA TUNA	732	697	600	625	+107	730	2
SANDSTONE	528	507	470	475	+53	528	0
TERMINAL ISLAND (MALE)	760	762	650	675	+85	730	30
TEXARKANA	568	591	500	525	+43	566	2
FT. WORTH (M) 10-20-71.	361	0	450	500	-139	327	34
FT. WORTH (F) 11-26-71.	57	0	50	50	+7	56	1
SHORT TERM ADULTS	1,965	1,660	1,660	1,785	+180	1,799	166
EGLIN	455	426	350	400	+55	455	0
FLORENCE DET. JAIL	105	97	60	125	-20	86	19
LEAVENWORTH (CAMP)	203	0	200	200	+3	203	0
LOMPOC CAMP-OP 4/15/70.	346	332	350	350	-4	346	0
MONTGOMERY	273	263	225	225	+48	273	0
NEW YORK DET. JAIL	275	245	225	225	+50	128	147
SAFFORD	308	297	250	260	+48	308	0
FEMALE OFFENDERS	714	770	655	655	+59	672	42
ALDERSON	552	589	475	475	+77	521	31
TERMINAL ISLAND	162	181	180	180	-18	151	11
INTENSIVE MED. TREATMENT	1,042	884	1,050	1,050	-8	897	145
SPRINGFIELD HOSPITAL	665	595	750	750	-85	520	145
SPRINGFIELD CAMP	377	289	300	300	+77	377	0
COMMUNITY TREATMENT CTRS.	361	294	337	337	+24	322	39
ATLANTA	30	25	28	28	+2	28	2
CHICAGO	54	47	52	52	+2	49	5
DETROIT	42	34	30	30	+12	29	13
HOUSTON	26	25	36	36	-10	24	2
KANSAS CITY	22	19	15	15	+7	14	8
LOS ANGELES	52	51	50	50	+2	49	3
NEW YORK	83	43	70	70	+13	81	2
OAKLAND	24	23	26	26	-2	21	3
DALLAS 3-1-71	28	27	30	30	-2	27	1